Record No. 062388

IN THE SUPREME COURT OF VIRGINIA

JEREMY JAYNES,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

ON REHEARING

BRIEF OF THE COMMONWEALTH ON REHEARING

ROBERT F. MCDONNELL
Attorney General of Virginia

WILLIAM C. MIMS
Chief Deputy Attorney General

WILLIAM E. THRO (42179)
State Solicitor General
Counsel of Record

LISA M. HICKS-THOMAS
Deputy Attorney General

STEPHEN R. MCCULLOUGH (41699)
Deputy State Solicitor General

SAMUEL E. FISHEL, IV
Senior Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219

Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for Commonwealth of Virginia

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BRIEF OF THE COMMONWEALTH ON REHEARING

Virginia Attorney General Robert F. McDonnell, on behalf of the Commonwealth, submits this Brief on Rehearing. For the reasons stated below, this Court should reaffirm its original conclusion that Jaynes may not bring a facial challenge alleging overbreadth. Therefore, the judgment of the Virginia Court of Appeals should be affirmed.

INTRODUCTION

Virginia Code § 18.2-152.3:1, known as the Transmission of Unsolicited Bulk Electronic Mail (spam) statute ("the Act"), prohibits persons from falsifying identification information in order to gain access to the private property of another—a computer network.[1] Specifically, the Act prohibits individuals from using "a computer or computer network with the intent to falsify or forge electronic mail transmission information or other

[1] There is a fundamental difference between using a pseudonym and using fraudulent identification to communicate anonymously. Madison, Hamilton, and Jayne, could publish the FEDERALIST as "Publius," but they could not falsely claim to be Patrick Henry to gain access to a meeting of Anti-Federalists. Similarly, a modern day Virginian might post messages on the Internet using the pseudonyms of Madison, Mason, or Lee. However, the citizen communicating anonymously cannot claim to be Governor Kaine in order to reach a wider audience. By invoking the rhetoric of the Framing, Jaynes is in fact seeking to extend the constitutional protection far beyond its historical moorings. The right to communicate anonymously does not include the right to deceitfully impersonate another.

routing information in any manner in connection with the transmission of unsolicited bulk electronic mail through or into the computer network equivalent of an electronic mail service provider or its subscribers." *Virginia Code* § 18.2-152.3:1(A)(1). An individual is guilty of a felony if "[t]he volume of unsolicited UBE transmitted exceeded 10,000 attempted recipients in any 24-hour period, 100,000 attempted recipients in any 30-day time period, or one million attempted recipients in any one-year time period." *Virginia Code* § 18.2-152.3:1(B)(1). Jaynes concedes that he violated the Act, but challenges the constitutionality of the Act.

There is no doubt the Act is constitutional as applied to the commercial unsolicited bulk e-mail sent by Jaynes. Moreover, because "American law punishes persons who enter onto the property of another after having been warned by the owner to keep off," *Martin v. Struthers*, 319 U.S. 141, 147 (1943),[2] and because the "First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property,"

[2] *See also Virginia v. Hicks,* 539 U.S. 113, 123 (2003) (rejecting a First Amendment overbreadth challenge to the trespass policy of a public housing authority which had restricted access by outsiders); *Hall v. Commonwealth*, 188 Va. 72, 81, 49 S.E.2d 369, 373 (1948) (upholding conviction of Jehovah's Witness who trespassed in private apartment building).

Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972),[3] the Act is constitutional as applied to *non-commercial* unsolicited bulk e-mail received by an internet service provider that does not wish to receive it.[4]

Nevertheless, Jaynes insists that the Act is "invalid *in toto*" and, thus, "incapable of any valid application." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 494 n.5 (1982). Speculating that there are persons who falsify routing information in order to send more than 10,000 *non-commercial* e-mails in a single day and that some internet service providers *actually welcome* such unsolicited bulk e-mail, Jaynes argues that the Act is unconstitutionally overbroad. He asks this Court to invalidate the statute on its face based on the hypothetical claims of parties who are not before the court and who may not exist at all.

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[3] *See also Hudgens v. N.L.R.B.*, 424 U.S. 507, 513, 521 (1976) (no First Amendment privilege to picket store in shopping center against wishes of shopping center owner); *Central Hardware Co. v. N.L.R.B.*, 407 U.S. 539, 547-48 (1972) (a union has no First Amendment right to be present in privately owned parking lot).

[4] *See CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1025-27 (S.D. Ohio 1997) (internet service provider may use trespass statute against sender of unsolicited e-mail). *See also America Online, Inc. v. IMS*, 24 F. Supp. 2d 548, 550-51 (E.D. Va 1998) (unauthorized bulk e-mail constituted trespass); *Cyber Promotions, Inc. v. American Online, Inc.*, 948 F. Supp. 436, 441-42 (E.D. Pa. 1996) (no First Amendment right to send unsolicited e-mail to a proprietary computer system). *Cf. Loving v. Boren*, 956 F. Supp. 953, 955 (W.D. Okla. 1997) (state university computer system and internet services are not a public forum).

In its initial decision, this Court concluded that—as a matter of state law—Jaynes could not bring a facial challenge alleging overbreadth.[5] *Jaynes v. Commonwealth*, 275 Va. 341, 354-61, 657 S.E.2d 478, 485-90 (2008). For the reasons below, this Court should reaffirm its initial decision. Therefore, the judgment of the Court of Appeals should be affirmed.

ARGUMENT

I. STATE COURTS MAY DEVELOP THEIR OWN REQUIREMENTS FOR OVERBREADTH STANDING.

A. The United States Supreme Court Has Explicitly Held That State Courts May Develop Their Own Requirements for Overbreadth Standing.

There is no federal law obligation for state courts to hear facial challenges alleging overbreadth. While the question of whether a statute is overbroad is a matter of federal constitutional law, the question of who may

[5] This Court also held that (1) the Virginia courts have jurisdiction over Jaynes; (2) the Act does not violate the dormant Commerce Clause; and (3) the Act is not vague. *Jaynes,* 275 Va. at 349-52,361-65, 657 S.E.2d at 483-84, 490-92. None of those holdings is at issue in the rehearing. Indeed, the dissenting Justices accept the correctness of these holdings. *Id.* at 366, 657 S.E.2d at 492. (Lacy, S.J., joined by Koontz & Lemons, JJ., dissenting).

bring a facial challenge alleging overbreadth is a matter of *state law*.[6] As the Supreme Court of the United States explained:

> The problem with [Virginia's and the United States' proposal to limit overbreadth standing to individuals who have engaged in expressive conduct] is that we are reviewing here the decision of a *State* Supreme Court; our standing rules limit only the *federal* courts' jurisdiction over certain claims. "State courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law." Whether Virginia's courts should have *entertained* this overbreadth challenge is entirely a matter of state law.

Hicks, 539 U.S. at 120 (citation omitted) (emphasis original).

"The authority of the several states to make their own standing rules regarding an overbreadth challenge is unmistakable…." *Jaynes,* 275 Va. at 358, 657 S.E.2d at 488*.* The United States Supreme Court was clear. *Hicks* did not say that States must hear all overbreadth claims that meet the federal requirements of overbreadth standing. Nor did it did not say that the States are forbidden from adopting more restrictive overbreadth standing requirements. Rather, the United States Supreme Court simply said that

[6] All members of this Court agree that the States can develop their own overbreadth standing requirements. *Jaynes*, 275 Va. at 354, 657 S.E.2d at 485 (Opinion of the Court); *Id*. at 371-72, 657 S.E.2d at 496 (Lacy, S.J., joined by Koontz & Lemons, JJ., dissenting). However, the dissenting Justices believe that this Court should allow overbreadth challenges to the same extent as those permitted in federal court. *Id*. at 372-73, 657 S.E.2d at 496-97.

the state courts could decide, as a matter of state law, whether to entertain an overbreadth challenge. *Hicks*, 539 U.S. at 120.

Relying on dicta in *Bigelow v. Virginia,* 421 U.S. 809 (1975) and *Ferber v. New York,* 458 U.S. 747, 767 (1982), Jaynes and the ACLU claim that the United States Supreme Court has declared that state courts must use federal overbreadth standing requirements. *Jaynes Rehearing Br.* at 43, *ACLU Rehearing Br.* at 2-3. The statements upon which Jaynes and the ACLU rely are dicta. *Jaynes,* 275 Va. at 358, 657 S.E.2d at 488 (discussing *Bigelow*). The United States Supreme Court is "not bound to follow our dicta in a prior case in which the point now at issue was not fully debated." *Central Virginia Community College v. Katz*, 546 U.S. 356, 363 (2006). "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 399 (1821). "Thus, the force, if any, of the earlier Supreme Court decision in *Bigelow* on the issue of Virginia standing is clearly and unequivocally negated by *Hicks.*"*Jaynes*, 275 Va. at 358, 657 S.E.2d at 488.

Jaynes simply ignores the discussion of overbreadth standing in *Hicks*. Instead, Jaynes insists that the overbreadth doctrine is entirely substantive and that this Court must follow United States Supreme Court precedent. *Jaynes Rehearing Br*. at 2-6. Jaynes misses a subtle but constitutionally significant point. The overbreadth doctrine has both a substantive component and a standing component. *Hicks,* 539 U.S. at 120-21. Questions regarding the standing component are resolved using state law and may not be reviewed by the United States Supreme Court. *Id*. at 120. Questions regarding the substantive component—i.e. is the statute constitutionally overbroad—are resolved using federal constitutional law and may be reviewed by the United States Supreme Court. *Id.* at 121. *Hicks* illustrates the point. After noting that it could not review this Court's state law decision concerning overbreadth standing, *id*. at 120, the United States Supreme Court proceeded to review—and ultimately reverse—this Court's resolution of the substantive overbreadth issue.

In sum, *Hicks* establishes that state courts may develop their own requirements of overbreadth standing, but must follow the United States

Supreme Court on substantive overbreadth questions.[7] There is no requirement for this Court to follow federal standing requirements.

B. State Courts May Decline to Hear Federal Constitutional Claims.

State courts of "adequate and appropriate" jurisdiction, *Testa v. Katt,* 330 U.S. 386, 394 (1947), may be required "to enforce federal prescriptions, insofar as those prescriptions relat[e] to matters appropriate for the judicial power," *Printz v. United States*, 521 U.S. 898, 907 (1997). However, this requirement to hear federal claims is not absolute. A state court may refuse to hear a federal claim if the refusal is based on a state law that bars *both* federal and state claims alike under similar circumstances. *Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1, 4

[7] A case pending in the United States Supreme Court, *United States v. Williams,* No. 06-694 (Oral Argument Oct. 30, 2007), which involves an overbreadth challenge to a child pornography statute, 18 U.S.C. 2252A(a)(3)(B), may refine or clarify certain aspects of the overbreadth doctrine. A decision in *Williams* may occur before oral argument in the case at bar and almost certainly will occur before this Court renders a decision.

Thus, if this Court entertains Jaynes' overbreadth challenge, it will be obligated to apply whatever refinements or clarifications result from *Williams*. If those refinements and clarifications are significant, the Commonwealth will seek leave to file a supplemental brief regarding the impact of *Williams*.

(1950).[8] Conversely, if the state law bars federal claims, but permits similar state claims, the state court must hear the federal claim. *See Howlett v. Rose*, 496 U.S. 356, 375 (1990). As this Court has never heard an overbreadth challenge based on the Virginia Constitution, it can refuse to hear overbreadth claims based on the National Constitution.

C. To the Extent That State Courts Choose to Entertain Federal Constitutional Claims, State Courts Need Not Follow Federal Standing Requirements.

To the extent that state courts choose to entertain federal constitutional claims, "state courts need not impose the same standing or remedial requirements that govern federal court proceedings." *City of Los Angeles v. Lyons,* 461 U.S. 95, 113 (1983). The States are free to develop their own rules of standing and to apply them in determining whether to hear claims based on federal law. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989).

[8] *See also Herb v. Pitcairn*, 324 U.S. 117, 123 (1945) (upholding a state court's dismissal of a federal claim under a state law barring jurisdiction in a city court over causes of action arising outside the city, and stating the rule that "the cause of action must not be discriminated against because it is a federal one."); *Douglas v. New York, New Haven & Hartford R.R.*, 279 U.S. 377, 387 (1929) (upholding a state court's dismissal of a federal FELA claim based on a state law barring actions by nonresidents against foreign corporations).

Indeed, Virginia law has long recognized standing principles that differ from federal standing requirements. In general, for a person to have standing in a Virginia court, "he must show that he has an *immediate, pecuniary and substantial interest* in the litigation, and not a remote or indirect interest." *Nicholas v. Lawrence*, 161 Va. 589, 593, 171 S.E. 673, 674 (1933) (emphasis added). "[I]t is not sufficient that the sole interest of the petitioner is to advance some perceived public right or to redress some anticipated public injury …." *Virginia Beach Beautification Comm'n v. Board of Zoning Appeals*, 231 Va. 415, 419, 344 S.E.2d 899, 902 (1986). In sharp contrast, federal standing requirements are more expansive, *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561 (1992), and recognize associational or representative standing. *Hunt v. Washington Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977). Although "the courts of this Commonwealth, not the federal courts, have the primary responsibility to consider and construe the statutes of this Commonwealth," *Jaynes*, 275 Va. at 366, 657 S.E.2d at 493 (Lacy, S.J., joined by Koontz & Lemons, JJ., dissenting), a litigant may choose to challenge a Virginia statute in federal court simply because the federal standing requirements are easier.[9] Such

[9] Of course, the federal courts may not review the constitutionality of a state statute if the plaintiff in federal court faces a pending state criminal or administrative proceeding. *Younger v. Harris,* 401 U.S. 37, 41 (1971).

forum shopping is the price of dual sovereignty.[10]

II. EVEN IF STATE COURTS ARE OBLIGATED TO FOLLOW FEDERAL OVERBREADTH STANDING REQUIREMENTS, JAYNES MAY NOT BRING A FACIAL CHALLENGE ALLEGING OVERBREADTH.

If this Court determines that state courts must follow federal overbreadth standing requirements, the inquiry does not end. This Court must still decide if Jaynes may bring an overbreadth challenge. Specifically, it must determine whether: (1) Jaynes preserved the overbreadth issue in the trial court; and (2) Jaynes waived his right to challenge the Commonwealth's position that state courts may develop their own overbreadth standing requirements.[11]

A. Jaynes Failed to Preserve His Facial Challenge Alleging Overbreadth.

As explained in more detail in the initial brief, *Commonwealth Initial Br.* at 24-25, Jaynes did not raise a facial challenge alleging overbreadth in

[10] Indeed, the only way to avoid such forum shopping would be to adopt the federal requirements for standing, evidence, discovery, and summary judgment.

[11] This Court's Order granting rehearing explicitly mentioned only the second question, but the first question—whether Jaynes preserved the issue in the trial court—is a necessary antecedent to the second question.

the trial court.[12] Although Jaynes did use the term "overbroad," *App.* at 23, in the context of his claim that strict scrutiny applies to the Act, his argument cannot be construed to have alerted the court to the argument he now makes on appeal. As this Court explained:

> The main purpose of requiring timely specific objections is to afford the trial court an opportunity to rule intelligently on the issues presented, thus avoiding unnecessary appeals and reversals. In addition, a specific, contemporaneous objection gives the opposing party the opportunity to meet the objection at that stage of the proceeding.

Weidman v. Babcock, 241 Va. 40, 44, 400 S.E.2d 164, 167 (1991). Because he did not raise a facial overbreadth challenge in the trial court, Jaynes may not raise the issue in this Court. *McDonald v. Commonwealth,* 274 Va. 249, ___, 645 S.E.2d 918, 921 (2007).[13] Moreover, the mere fact that Jaynes challenged the constitutionality of the Act or claimed that it somehow violated the First Amendment is insufficient to preserve the overbreadth challenge. *See Davenport v. Washington Educ. Ass'n*, 127 S. Ct. 2372, 2382 (2007) (Supreme Court of the United States would not address First Amendment facial challenge alleging overbreadth

[12] This Court's initial opinion did not address whether Jaynes preserved his facial challenge in the trial court. Since this Court concluded that Jaynes lacked standing to raise his overbreadth challenge, there was no reason to address it.

[13] *See also* VIRGINIA SUP. CT. R. 5:25.

"because at no stage of this litigation has respondent made an overbreadth challenge.").

B. Jaynes Failed to Challenge the Commonwealth's Assertion that State Courts May Develop Their Own Requirements For Overbreadth Standing.

As Jaynes concedes, he never challenged the Commonwealth's assertion that state courts may develop their own requirements for overbreadth standing. *Jaynes Rehearing Br.* at 9, 12. While *Jaynes* consistently argued that this Court *should hear* his overbreadth claim, he never disputed *the ability of this Court to refuse to hear it* as a matter of state law.[14] Having failed to argue that this Court was bound to apply federal overbreadth standing requirements, Jaynes cannot raise the issue now. Moreover, the fact that ACLU—as amicus curiae—raised the issue is insufficient.

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[14] Jaynes claims "a detailed analysis of *Hicks* was unnecessary because the Commonwealth had not cited a single Virginia case to support its argument that this Court should not recognize Jaynes's facial First Amendment challenge." *Jaynes Rehearing Br.* at 9. Apparently, Jaynes believes that he does not have to respond to arguments based on United States Supreme Court cases unless the Commonwealth also cites a case from a Virginia court.

This assertion is strange. Litigants may rely on federal cases, Virginia cases, cases from other States, or even cases from other nations. The Commonwealth's position—that state courts may develop their own overbreadth standing requirements—is based on *Hicks*.

III. IF STATE COURTS ARE ALLOWED TO DEVELOP THEIR OWN REQUIREMENTS OF OVERBREADTH STANDING, THIS COURT SHOULD REFUSE TO ENTERTAIN JAYNES' OVERBREADTH CHALLENGE.

If this Court determines that state courts may develop their own overbreadth standing requirements, the inquiry does not end. This Court must decide if—as a matter of state law—*Jaynes* may bring an overbreadth challenge.

As a matter of state law, Jaynes may not do so. First, *Wayside Restaurant, Inc. v. City of Virginia Beach,* 215 Va. 231, 234-45, 208 S.E.2d 51, 54 (1974) holds that individuals who engage in commercial speech may not bring overbreadth claims. *Jaynes*, 275 Va. at 357-58, 657 S.E.2d at 487-88. Second, regardless of the precedential effect of *Wayside Restaurant,* principles of judicial restraint suggest that this Court should refuse to entertain Jaynes' facial challenge alleging overbreadth.[15]

[15] Although this Court did not direct the parties to address whether policy considerations justify entertaining Jaynes' overbreadth challenge, the ACLU addresses the issue in its brief. *ACLU Rehearing Brief* at 5-8. The Commonwealth should be allowed to respond to the arguments made by amicus.

A. *Wayside Restaurant* Compels a Finding That Jaynes Lacks Standing.

In *Wayside Restaurant*, this Court found that the Plaintiffs could not bring a facial challenge alleging overbreadth because they "are admittedly engaged in ... a commercial enterprise." *Wayside Restaurant,* 215 Va. at 234-35, 208 S.E.2d at 54. "More importantly, *Wayside Restaurant* has never been overruled." *Jaynes*, 275 Va. at 358, 657 S.E.2d at 488.[16]

Nor is there any reason to do so. Commercial speech is entitled to less constitutional protection than non-commercial speech.[17] A person who engages in commercial speech should not be able to obtain an advisory opinion on the hypothetical applications of the statute to persons that may not exist. If state courts are allowed to develop their own requirements of overbreadth standing, then *Wayside Restaurant* should be reaffirmed.

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[16] Decisions of this Court, like decisions of the United States Supreme Court, may not be overruled by implication. *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

[17] *See Reno v. ACLU,* 521 U.S. 844, 877 (1997) (Communications Decency Act is unconstitutionally overbroad because it was not limited to commercial speech). *See also Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 165 (2002) (local ordinance barring solicitation was unconstitutional because it was not restricted to commercial solicitation); *Village of Schaumberg v. Citizens for a Better Env't*, 444 U.S. 620, 632 n.7 (1980) (distinction between commercial and non-commercial speech is relevant for purposes of overbreadth doctrine).

Jaynes devotes a substantial portion of his brief to the assertion that *Wayside Restaurant* did not mean what it said. *Jaynes Rehearing Br*. at 13-19. However, Jaynes' argument is based primarily on dicta in *Bigelow* and a circuit court decision. Neither can form a basis for limiting *Wayside Restaurant.*

B. Regardless of the Precedential Effect of *Wayside Restaurant*, This Court Should Refuse to Entertain Jaynes' Overbreadth Challenge.

Regardless of the precedential effect of *Wayside Restaurant*, this Court should refuse to entertain facial challenges alleging overbreadth.[18] As the United States Supreme Court recently explained:

> Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of "premature interpretation of statutes on the basis of factually barebones records." Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither "'anticipate a question of constitutional

[18] There are two ways to bring a facial challenge. First, a litigant may allege "that no set of circumstances exists under which the Act would be valid." *United States v. Salerno,* 481 U.S. 739, 745 (1987). Second, in some limited First Amendment contexts, litigants in *federal* court may bring a facial challenge alleging overbreadth. In a successful facial challenge alleging overbreadth, the law is invalidated in *all* applications because it is invalid in *many* applications. *Hicks,* 539 U.S. at 118-19 ("The showing that a law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep,' suffices to invalidate *all* enforcement of that law, 'until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.'") (citations omitted).

> law in advance of the necessity of deciding it'" nor "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'". Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that "'[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'"

Washington State Grange v. Washington State Republican Party, 128 S. Ct. 1184, 1191 (2008) (citations omitted). Indeed, facial challenges alleging overbreadth, "are fundamentally at odds with the function of the … courts in our constitutional plan. The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision." *Younger,* 401 U.S. at 52.

The ACLU insists that there are important public policy reasons why this Court should entertain facial challenges alleging overbreadth. *ACLU Rehearing Br*. at 5-8. While the ACLU bases much of its policy argument on cases from the 1960's, 1970's, and 1980's, it ignores cases from this century where the United States Supreme Court has refused to entertain facial challenges and/or otherwise limited facial challenges. For example, the Court held that if a statute has both constitutional and unconstitutional applications, federal courts generally should enjoin only the unconstitutional applications. *Ayotte v. Planned Parenthood,* 546 U.S. 320, 329 (2006). As

a practical matter, this holding seems to foreclose facial challenges alleging overbreadth outside of some First Amendment contexts. Similarly, federal courts should not have entertained a facial challenge to a federal statute banning partial birth abortion. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1638 (2007). Finally, even in the First Amendment context, overbreadth challenges are unavailable if the persons not before the court "are sufficiently capable of defending their own interest in court that they will not be significantly 'chilled'." *Davenport*, 127 S. Ct. at 2383 n.5. This Court should follow the contemporary trend in United States Supreme Court jurisprudence and limit facial challenges alleging overbreadth.[19]

[19] If this Court decides to entertain Jaynes' overbreadth challenge, then it will have to address the merits of Jaynes' overbreadth challenge. For the reasons stated in the Commonwealth's Initial Brief, in the Amicus Curiae Brief of the United States Internet Service Provider Association, and in the Commonwealth's Motion to Brief an Additional Issue, the Act is not unconstitutionally overbroad.

CONCLUSION

For the reasons stated above, in the Commonwealth's Initial Brief, and in the Amicus Curiae Brief of the United States Internet Service Provider Association, the judgment of the Court of Appeals of Virginia should be **AFFIRMED.**

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

BY: */s/ William E. Thro*
Counsel

ROBERT F. MCDONNELL
Attorney General of Virginia

WILLIAM C. MIMS
Chief Deputy Attorney General

WILLIAM E. THRO (42179)
State Solicitor General
Counsel of Record

LISA M. HICKS-THOMAS
Deputy Attorney General

STEPHEN R. MCCULLOUGH (41699)
Deputy State Solicitor General

SAMUEL E. FISHEL, IV
Senior Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219

Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for Commonwealth of Virginia

May 16, 2008

CERTIFICATE OF SERVICE

I certify that on this 16th day of May 2008, twenty copies of the BRIEF OF THE COMMONWEALTH OF VIRGINIA ON REHEARING have been filed in the office of the clerk of the Supreme Court of Virginia and three copies have been mailed by first class, postage prepaid, U. S. Mail to counsel listed below:

Thomas M. Wolf
John H. Craddock, Jr.
LECLAIR RYAN PC
951 East Byrd Street, Eighth Floor
Richmond, Virginia 23219
Counsel for Jaynes

Rebecca K. Glenberg
AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA FOUNDATION, INC.
6 North Sixth Street, Suite 400
Richmond, Virginia 23219
Counsel for Amicus Curiae AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA

Jennifer C. Archie
Alexander Maltas
LATHAM & WATKINS
555 Eleventh St., N.W.
Suite 1000
Washington, D.C. 20004
Counsel for Amicus Curiae
UNITED STATES INTERNET SERVICE PROVIDER ASSOCIATION

L. Ilaine Upton (VSB 31153)
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Post Office Box 7482
Charlottesville, Virginia 22906-7482
Counsel for Amicus Curiae THE RUTHERFORD INSTITUTE

/s/ William E. Thro
Counsel